UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DANIEL J. DONOVAN,	***)***	
	)	
Petitioner	***)***	
	)	
v.	***)***	***Docket No. 00-268-P-H***
	)	
STATE OF MAINE,	***)***	
	)	
Respondent	***)***	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his conviction in the Maine Superior Court (Kennebec County) on charges of gross sexual assault, assault, criminal mischief and violation of bail condition, in violation of 17-A M.R.S.A. §§ 253, 207 and 806 and 15 M.R.S.A. § 1092. I recommend that the court dismiss the petition as untimely.

I. Background

On February 5, 1996 a jury convicted the petitioner after a five-day trial on all of the charges against him. Docket Sheet, *State of Maine v. Daniel Donovan*, Docket No. CR94-393, Maine Superior Court (Kennebec County) ("Docket Sheet"), at 1, 3-4. The petitioner appealed his conviction, and the Law Court denied the appeal. *State v. Donovan*, 698 A.2d 1045 (Me. 1997). The petitioner also sought leave to appeal his sentence, which was denied. Docket Sheet at 5, 6. On February 17, 1998 the petitioner filed a petition for post-conviction review. Docket Sheet, *State of Maine v. Daniel Donovan*, Docket No. AUGSC-CR-1998-71, Maine Superior Court (Kennebec County) ("Post-Conviction Docket Sheet"), at 1. The petition itself was signed and notarized on

February 12, 1998. Petition for Post-Conviction Review, *Daniel J. Donovan v. State of Maine*, Docket No. CR-94-393 [sic], Maine Superior Court (Kennebec County), at 4. After holding an evidentiary hearing, the Superior Court denied post-conviction relief in a written opinion dated October 13, 1999 and entered on the docket on October 28, 1999. Decision on Post Conviction Review, *Daniel Donovan v. State of Maine*, Docket No. CR-98-71, Maine Superior Court (Kennebec County), at 4; Post-Conviction Docket Sheet at 3-4. The petitioner filed an appeal from this decision on November 4, 1999, Post-Conviction Docket Sheet at 4, which by virtue of 15 M.R.S.A. § 2131(1) is deemed to be a request for a certificate of probable cause, which is required in order for such an appeal to proceed. The Law Court denied the request for a certificate by order dated December 20, 1999, Order Denying Certificate of Probable Cause, *Daniel Donovan v. State of Maine,* Docket No. Ken-99-664, Maine Supreme Judicial Court sitting as the Law Court, entered on the Law Court docket on December 22, 1999, Docket Sheet, *Daniel Donovan v. State of Maine,* Docket No. KEN-99-664, Maine Supreme Judicial Court sitting as the Law Court (certified copy in this court's case file), and entered on the Superior Court docket on December 27, 1999, Post Conviction Docket Sheet at 4.

The petition before this court was filed on September 26, 2000. Docket. The petitioner's signature was notarized on September 14, 2000. Petition Under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Petition"), included in Petitioner's Pro Se Memorandum Supporting His Petition for Writ of Habeas Corpus, etc. ("Petitioner's Memorandum") (Docket No. 2), at 7. The memorandum of law accompanying the petition is dated September 23, 2000 and includes a statement that its contents are true and correct to the best of the petitioner's knowledge and a certificate of service by mail with the same date. Petitioner's Memorandum at 42-43. The container in which the petition and memorandum arrived at this court is postmarked September 25, 2000.

II. Discussion

The state contends that this petition was filed beyond the one-year statute of limitations created by 28 U.S.C. § 2244 and accordingly must be dismissed as untimely. Response to Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, etc. ("State's Response") (Docket No. 7) at 12-15. That statute provides, in relevant part:

> **(1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> > **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > **(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > **(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > **(D)** the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> **(2)** The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). The petitioner does not suggest that any subsection other than 1(A) is implicated by the facts in this case.

The state calculates the running of the one-year period, given the intervening state post-conviction review proceeding, as follows. The petitioner's direct appeal from the state criminal judgment was decided on August 8, 1997. *Donovan*, 698 A.2d at 1045. The 90-day period for seeking certiorari review to the Supreme Court, 28 U.S.C. § 2101(c), expired on November 6, 1997. The one-year period of limitation under section 2244(d) began to run on November 7, 1997. On the

one-hundred-and-second day of that period, February 17, 1998, the petitioner filed his petition seeking state post-conviction review, thereby tolling the running of the one-year period so long as the post-conviction review was pending. *See generally Gaskins v. Duval*, 183 F.3d 8, 9 (1st Cir. 1999). The state post-conviction review proceeding was no longer pending as of December 20, 1999, the date of the Law Court's order denying a certificate of probable cause to allow an appeal from the Superior Court's denial of the petition. The limitation period began to run again on December 21, 1999, and expired 17 days before the current petition was filed in this court on September 26, 2000. State's Response at 12-13.

The state concedes that the "prison mailbox rule" established in *Houston v. Lack*, 487 U.S. 266, 276 (1988), applies to this petition. That rule directs that a *pro se* prisoner files a pleading for purposes of a given filing deadline when he delivers the pleading to prison authorities for mailing. In this case, the state relies on the execution date contained in the petitioner's memorandum (September 23, 2000) as the evidence of that date and thereby reduces the number of days by which the petitioner exceeded the limitations period to 14. State's Response at 14. The state also notes that, if the prisoner mailbox rule applied to the filing of the petitioner's state post-conviction proceeding, so that the petition which initiated that proceeding would be deemed to have been filed on the date on which it was given to prison authorities for mailing, rather than the day on which it was docked in the superior court, the fact that the state petition was signed and notarized on February 12, 1998, although not entered on the docket until February 17, 1998, would increase the period during which the state proceeding was pending by five days, so that the petitioner's filing in this court would be only 9 days after the expiration of the limitations period.[1] *Id.* at 14-15. Even so, notes the state, the petition is still untimely.

[1] While the Maine Law Court has specifically declined to decide whether to adopt the "prison mailbox rule," *Finch v. State*, 736 (*continued on next page*)

The petitioner attacks this calculation on several fronts. First, he states that he "was and still is convinced that his filing deadline was at least December 29, 2000, which is 1 year after the denial of issuance of a Certificate of Probable Cause by the Maine Law Court in his State Post Conviction." Petitioner's Reply to States [sic] Response to Petition for Writ of Habeas Corpus, etc. ("Petitioner's Reply") (Docket No. 12) at 2. That position is incorrect as a matter of law. *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000). It is inconsistent with the language of section 2244(d), which clearly provides that the time during which a state post-conviction proceeding is pending "shall not be counted toward any period of limitation under this section," not that the pendency of any such proceeding will restart the running of the entire period. The only events that initiate the one-year period are set forth in section 2244(d)(1) and do not include the conclusion of a state post-conviction proceeding.

The petitioner next contends that calculation of the one-year period should not begin on November 7, 1997, the ninetieth day following the Law Court's denial of his direct appeal, because he did not receive notification of that denial until August 13, 1997, five days after it was issued. Petitioner's Reply at 3-4. This argument also fails under federal statutory law. The time in which to seek a writ of certiorari from the Supreme Court is set by 28 U.S.C. § 2101(c): "[A]ny writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be . . . applied for within ninety days after the entry of such judgment or decree." It is the date of entry of the judgment, not the date upon which a party receives notice of the entry of the judgment, that governs.

A.2d 1043, 1043 n.1 (Me. 1999), it is unlikely that the federal courts would apply the rule to the filing of a petition for post-conviction review in the process of determining whether the statute of limitations imposed by 28 U.S.C. § 2244(d) had run. *See Artuz v. Bennett*, 69 U.S.L.W. 4001, 4002 (Nov. 7, 2000) (construing § 2244(d)(2)): "An application is 'filed,' as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record." *See also Adams v. LeMaster*, 223 F.3d 1177, 1181 (10th Cir. 2000) ("[W]e hold the federal mailbox rule announced in *Houston v. Lack*

(*continued on next page*)

The third challenge advanced by the petitioner is to the state's use of December 20, 1999, the date when the Law Court order denying a certificate of probable cause for appeal from the Superior Court's denial of his petition for post-conviction review, as the date upon which that proceeding ceased to be pending. He proffers the Superior Court docket sheet showing that the Law Court order was docketed in that court on December 27, 1999 and contends that the running of the one-year statute of limitations should not have resumed until December 28, 1999. Petitioner's Reply at 5. The petitioner correctly points out that the date on which the order was signed is not the date upon which the proceeding was concluded; the proceeding was pending until the decision of the highest court was final. Finality arises upon entry of an order disposing of all claims on the docket. However, it is not the Superior Court docket that governs in this instance. The petitioner's state post-conviction proceeding was no longer pending within the meaning of 28 U.S.C. § 2244(d)(2) when the order denying the requested certificate of probable cause was entered on the Law Court docket. That entry was made on December 22, 1999. The state's error in this respect is accordingly only two days, not enough to make the filing of the petition timely under section 2244.

The petitioner also contends that his state post-conviction proceeding should be considered to have been pending for purposes of section 2244(d)(2) until he received notice of the Law Court's denial of his request for a certificate of probable cause. Petitioner's Reply at 5. While section 2244 does not define "pending," the petitioner's argument has been rejected by the reporting courts that have considered it. *Evans v. Senkowski*, 105 F.Supp.2d 97, 100 (E.D.N.Y. 2000); *Ramos v. Walker*, 88 F.Supp.2d 233, 235-36 (S.D.N.Y. 2000); *see also Geraci v. Senkowski*, 211 F.3d 6, 9 (2d Cir. 2000). I find the reasoning of these courts to be persuasive.

---

does not apply to § 2244(d)(2) for purposes of determining when the tolling period for a properly-filed state petition begins.").

The petitioner next argues in his verified reply memorandum that he actually first presented the instant petition to prison authorities for mailing on September 22, 2000 despite the notarized date of September 23, 2000 that appears on his memorandum. Petitioner's Reply at 6. This single extra day would not bring the petitioner within the one-year period.

The petitioner also contends that the limitations period should be tolled for an additional 90 days representing the period during which he could have sought a writ of certiorari from the United States Supreme Court after the Law Court's denial of a certificate of probable cause to appeal from the denial of his state petition for post-conviction review, although he did not do so. *Id*. at 17. The courts which have considered this argument have uniformly rejected it. *E.g.*, *Isham v. Randle*, 226 F.3d 691, 694-95 (6th Cir. 2000); *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999). Again, I find the reasoning of these courts to be persuasive. The petitioner next asserts that the state may not rely on the statute of limitations to bar his petition because it has not alleged that it has been prejudiced by his failure to file the petition within the statutory time limit. Petitioner's Reply at 19-20. The state need not show prejudice when it invokes the statute of limitations set forth in section 2244(d). *Wyzykowski v. Department of Corrections*, 226 F.3d 1213, 1216 (11th Cir. 2000). The petitioner takes nothing by either of these arguments.

The petitioner's final arguments are based on an apparent claim for equitable tolling of the limitations period, based on a prison transfer, lack of access to a prison law library, delay in receiving the transcript of the evidentiary hearing held on his state petition for post-conviction review, and the allegedly improper decision of the Law Court not to consider his claim of ineffective assistance of counsel on direct appeal. Petitioner's Reply at 7-21. These claims are without merit.

Equitable tolling of the statute of limitations applicable to section 2254 petitions is available upon demonstration of "extraordinary circumstances beyond [the petitioner's] control making it impossible to file the petition on time." *Turner v. Smith*, 70 F.Supp.2d 785, 787 (E.D.Mich. 1999). Here, the petitioner did not file a defective pleading within the statutory period nor has he shown that he was induced or tricked by any state misconduct into allowing the filing deadline to pass. *Id*. Ignorance of the law alone is insufficient to invoke equitable tolling. *Id*. *Pro se* petitioners are not entitled to any latitude in dealing with straightforward procedural requirements like the section 2244 statute of limitations. *Id*.

Specifically, with respect to the claims involving transfer and access to a prison law library, the petitioner states in his verified reply memorandum that, during the period between the denial of his direct appeal by the Law Court on August 4, 1997 and the filing of his petition for post-conviction relief in the state courts, he was transferred on October 2, 1997 to a prison at which the law library was closed. Petitioner's Reply at 7-8. He was allowed something less than a full hour in the law library at the new facility "at the end of October 1997," and thereafter throughout November and December 1997 and January 1998 one hour per week, without forms, carbon paper or photocopying. *Id*. at 8. In late January or early February 1998, the facility's policy changed to allow inmates two hours per week in the law library. *Id*. at 8-9. The petitioner presented his state petition for post-conviction review to prison authorities for mailing on February 12, 1998. The petitioner contends that "101 days should be tolled to cure the damages that occurred to him as a result of the Law Library being closed," including the days from the Law Court's denial of his direct appeal, which was issued after his transfer, to the date of the filing of his state petition for post-conviction review. *Id*. at 9. He cites *Bounds v. Smith*, 430 U.S. 817 (1977), and *Lewis v. Casey*, 518 U.S. 343 (1996), in support of this argument.

While the Supreme Court did state in *Bounds*, a case brought under 42 U.S.C. § 1983, that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law," 430 U.S. at 828, it also stated in *Lewis* that "*Bounds* did not create an abstract, freestanding right to a law library or legal assistance," 518 U.S. at 351. "[A]n inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." *Id*.

> [T]he inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.

Id. The Supreme Court specifically disclaimed any statements in *Bounds* that "appear to suggest that the State must enable the prisoner to . . . *litigate effectively* once in court." *Id*. at 354 (emphasis in original). Here, the petitioner was able to file a timely petition for state post-conviction review which he characterizes as "convincing," Petitioner's Reply at 10. He contends that, due to the limited library time, he "could address no other concerns besides the State post conviction review," *id*. at 9, but he could not file a section 2254 petition in this court until he had exhausted his state remedies through the state post-conviction review proceeding, 28 U.S.C. § 2254(b)(1)(A), and the substantive issues raised in the instant federal petition are almost identical[2] to issues raised in the state proceeding, *compare*

[2] The exception is a reference in the first issue presented in the instant petition to trial counsel's alleged failure to "investigate the physical evidence," Petition at 5, which the petitioner asserts was "addressed in the Petitioner's Request for C[ertificiate] O[f] P[robable] C[ause]," Petitioner's Memorandum at 5. The state contends that the petitioner has not exhausted the failure-to-investigate claim in state court as required by section 2254, State's Response at 16-18, although it admits that counsel for the petitioner did present this issue in a memorandum of law submitted to the Law Court in support of the request for a certificate of probable cause, *id*. at 16. The petitioner suggests that the state court should have been alerted to his failure-to-investigate claim by the nature of the presentation made to it. Petitioner's Reply at 2. In any event, it is not necessary to reach this issue given the conclusion I reach about (*continued on next page*)

Petition at 5[3] *with* Petition for Post-Conviction Review, *Daniel J. Donovan v. State of Maine*, Docket No. Cr-94-393, Maine Superior Court (Kennebec County) at 3. The petitioner has not demonstrated the type of extraordinary circumstances arising from his limited access to a prison law library before presenting his state post-conviction claims, in which he was ultimately represented by counsel, that would entitle him to tolling of the section 2244(d) limitations period. *See generally Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Hullum v. Maloney*, 14 F.Supp.2d 164, 166 (D.Mass. 1998).

The plaintiff seeks tolling of 68 days of the limitations period due to the state's asserted delay in providing him with a transcript, at state expense, of the hearing held in the post-conviction proceeding, counting from the date of the order granting his motion for the transcripts until the day he received them. Petitioner's Reply at 10. It would, of course, be impossible for a court reporter to have produced the 250-page transcript, Transcript, Post-Conviction Review, *Daniel Donovan v. State of Maine*, Maine Superior Court (Kennebec County), Docket No. CR-98-71, immediately after the entry of that order. The transcript itself bears a date of July 18, 2000, *id*. at 251, and was mailed to the petitioner on that day, Exh. 15a to Petitioner's Reply, although he states that he did not receive it until July 24, 2000, Petitioner's Reply at 12. In any event, from the date of receipt the petitioner still had over seven weeks left in the limitations period. That appears to be ample time in which to prepare arguments concerning the section 2254 petition, stating issues that had already been presented to the state court, particularly when it is the filing of the petition alone that is the significant event, and the petition form directs the petitioner not to cite cases or law and to state the relevant facts briefly.

The petitioner asserts that "[t]his intense delay caused serious setbacks for the Petitioner's filing" and that "he used a substantial portion of the relevant matter within the transcripts." *Id*. at 12. He then identifies the points that he believes are supported by the transcript. *Id*. at 12-13. Each of

---

the timeliness of the petition.

these points could be supported by citations to the trial transcript or an affidavit from the petitioner. The transcript of the post-conviction hearing is not necessary to support any of these allegations. The only allegation that could not have been supported by the trial transcript and upon which an affidavit of the plaintiff might be deemed to have insufficient factual support is the allegation that the petitioner's trial counsel failed to investigate "the Petitioners [sic] only defense to a charge of gross sexual assault." *Id*. at 12. None of the numerous specific citations to the transcript of the post-conviction hearing included in the petitioner's memorandum supports this allegation. The case law cited by the petitioner on this issue deals with delays in provision of transcripts of trial for use in the preparation of a direct appeal, a very different situation from that present here. More relevant is the case law declining to allow equitable estoppel to habeas petitioners based on an alleged delay in receipt of transcripts. *E.g.*, *Fadayiro v. United States*, 30 F.Supp.2d 772, 779 (D.N.J. 1998); *United States v. Van Poyck*, 980 F. Supp. 1108, 1110-11 (C.D.Cal, 1997). Almost exactly on point is *Brown v. Cain*, 112 F.Supp.2d 585 (E.D.La. 2000), in which the section 2254 petitioner sought equitable tolling of the section 2244(d) statute of limitations due to a seventeen-month delay in receiving transcripts of state trial and pre-trial proceedings. The court denied the request because the petitioner failed to show that the arguments presented relied specifically on the transcripts; "[r]ather, the arguments were essentially legal arguments that Petitioner could have lodged without the transcripts." *Id*. at 587. The same is true here, and the same result should obtain.

The petitioner's final argument in support of equitable tolling is somewhat difficult to understand. He asserts that

> [t]he decision to deny Petitioner an opportunity to address his ineffective assistance claims on direct appeal forced the Petitioner to proceed to post conviction BEFORE the Maine Law Court addressed his ineffective assistance claims. Petitioner submits that the 1-year period of limitations did

[3] Indeed, the petitioner states that the issues raised in the instant petition were presented in the state proceeding. Petition at 6.

> not commence because he was foreclosed from review of the claims which he is now seeking review.

Petitioner's Reply at 14. The petitioner sees prejudice to his claim in the fact that the Law Court based its refusal to consider his claim of ineffective assistance of counsel on its decision in *State v. Nichols*, 698 A.2d 521 (Me. 1997), which was decided three days before his appeal, *Donovan*, 698 A.2d at 1045, despite having been filed after his appeal. Petitioner's Reply at 14. The petitioner contends that the Law Court "implemented [a] change in Maine Law" on this point, while his appeal was pending. *Id*. at 15. To the contrary, as the opinion in *Nichols* makes clear, the Law Court has declined to consider claims of ineffective assistance of counsel on direct appeal at least since 1970. 698 A.2d at 521, citing *State v. Pullen*, 266 A.2d 222, 230-31 (Me. 1970). The only exception to this rule was that such claims could be raised on direct appeal if "the appeal record, within its own confines, establishes beyond possibility of rational disagreement the existence of representational deficiencies . . . which are plainly beyond rational explanation or justification." 698 A.2d at 521 (citation omitted). The Law Court in *Nichols* ended this exception, stating that all such claims would henceforth only be considered in the context of post-conviction review proceedings. *Id*. at 522. I have reviewed the petitioner's claims raised in his state post-conviction proceeding concerning the alleged insufficient assistance of his trial counsel, and none reaches the level of the pre-*Nichols* exception. Even if that were not the case, however, the petitioner was not injured by this change, because section 2244(d) tolls the limitations period for all the time that a state post-conviction proceeding is pending. The decision in *Nichols* could not have had any effect on the time available to the petitioner to bring his section 2254 claim (other than providing him with additional time for research and reflection while the state post-conviction proceeding was pending).

III. Conclusion

For the foregoing reasons, I recommend that the petition be **DISMISSED** without a hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 12th day of December, 2000.

David M. Cohen
United States Magistrate Judge

DANIEL J DONOVAN
plaintiff

DANIEL J DONOVAN
[COR LD NTC pse] [PRO SE]
MAINE STATE PRISON
BOX A
THOMASTON, ME 04861

v.

MAINE, STATE OF
defendant

CHARLES K. LEADBETTER
289-3661
[COR LD NTC]
ASSISTANT ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, ME 04333
626-8800